INDEX

LIST OF AUTHORITIES

Cases

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 206

HOUSTON INSULATION CONTRACTORS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER, HOUSTON INSULATION CONTRACTORS ASSOCIATION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 357 F. 2d 182 (R. 232). The Decision and Order of the National Labor Relations Board and the Trial Examiner's Decision are reported at 148 NLRB 866 (R. 197, 176).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 31, 1966 (R. 243). Petition for Writ of Certiorari, timely filed by Petitioner, was granted on October 10, 1966 (R. 245). The jurisdiction of this Court is derived from 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves pertinent parts of the National Labor Relations Act ("Act"), as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 158, §§ 8(b)(4)(i) and (ii)(B) and 10(f). They are printed in the Appendix at pages 29 to 31.

QUESTIONS PRESENTED

1. Whether the Court Below Erred in Affirming the Finding of the National Labor Relations Board That the Only Object of Strikes by Employees of Petitioner's Members Was Work Preservation in the Face of the Unrefuted Admission of the Union Secretary and Vice President That a Reason for the Refusal to Apply Materials Purchased by Petitioner's Members Was Because the Union Had No Contract with the Suppliers Thereof.

2. Whether the Subcontracting Provision of a Labor Agreement in the Construction Industry May Be Enforced by a Strike Against Materials of Suppliers Not Engaged in any Work on the Jobsite.

STATEMENT OF THE CASE

The central issue in this case is the legality of a refusal by members of Local Unions No. 22 and No. 113 (individually referred to as "Local 22" or "Local 113"), affiliates of the International Association of Heat and Frost Insulators and Asbestos Workers ("Union"), to apply certain materials on the jobsite upon instruction by the Union. These materials were furnished to Association members, Johns-Manville Sales Corporation ("Johns-Manville") and Armstrong Contracting & Supply Corporation ("Armstrong") by two off-jobsite, nonunion suppliers, Techalloy Company, Inc. ("Techalloy") and Thorpe Products Corporation

("Thorpe"), at two separate construction projects at Texas City and Victoria, Texas.

The Houston Insulation Contractors Association ("Association"), an employers' association of which Johns-Manville and Armstrong are both members, filed charges with the General Counsel of the National Labor Relations Board ("Board"). The Association alleged that the conduct of refusing to handle the materials, which was in fact a strike, was a secondary boycott of the products of Techalloy and Thorpe in violation of the provisions of Sections 8(b)(4)(i) and (ii)(B) of the Act.

The Association and Local 22 are signatories to a labor agreement covering the striking employees. This agreement contains two articles known as "subcontracting" and "preparation" clauses, which are the basis of the present dispute.

The two clauses provide in pertinent part:

Article
VI

"The Employer agrees that he will not sublet or contract out any work described in Article XIII . . ."

Article
XIII

"This agreement covers the rates of pay, rules and working conditions of all Mechanics and Improvers engaged in the preparation, distribution and application of pipe and boiler coverings, insulation of hot and cold surface ducts, flues, etc., also the covering of cold piping and circular tanks connected with the same, and

all other work included in the trade jurisdictional claims of the Union." (Chg. Pty. Ex. 1; Jt. App. 35, 132-145).*

The facts concerning the two construction projects involved in the case are detailed separately hereafter.

A. THE JOHNS-MANVILLE JOB

Johns-Manville, a subcontractor, was to furnish insulation on an applied basis at the American Oil Company's barge pipe ammonia loading dock being constructed at Texas City, Texas. In the course of performing its contract, Johns-Manville purchased precut stainless steel bands from Techalloy, a nonunion manufacturer and supplier not working on the jobsite. The Union directed the members of Local 22 to refuse to handle the materials supplied by Techalloy. The Union then informed the Johns-Manville contract manager that Johns-Manville was not permitted to subcontract or sublet the cutting of stainless steel bands to any other contractor and that its members would not handle any precut stainless steel bands purchased from any other employer. Union Business Agent Shrode told the Johns-Manville contract manager that the precut bands would not be applied without decals affixed to them, and that such decals would not be affixed "because they [the bands] were cut by someone other than an asbestos worker", and for that reason a member of Local 22 could not affix decals to them, and they would not be applied without decals affixed. (Jt. App. 60, 65).

B. THE ARMSTRONG JOB

Armstrong, also a subcontractor, was engaged in applying insulation to pipes at an E. I. DuPont de Nemours &

* By stipulation of the parties hereto, the Joint Appendix containing the evidence filed in the Court of Appeals has been filed as part of the Record in this Court. Citations herein to "Jt. App." are to that document.

Company ammonia plant being constructed at Victoria, Texas. In the course of performing the contract, it twice purchased mitered asbestos fittings from Thorpe. The fittings were manufactured in Thorpe's shop by nonunion employees.

When the fittings were delivered to the jobsite, the union members refused to apply them. The Business Agent for Local 113, who admitted that he was merely carrying out orders, told the job "foreman," who, in the asbestos trade, is an active union member working on the job, that the fittings would not be applied unless they bore union decals (Jt. App. 53, 54, 58).

C. THE PURPOSE OF THE STRIKES

1. The Testimony of International Vice President Baker:

Brooks Baker, an International Vice President of the Union and Secretary of Local 22 (Jt. App. 78), who was called as a witness by and on behalf of the International Union, testified as to the purposes of the strikes and the Union's objects in calling them (Jt. App. 78, 79).

In answer to questions by the International Union's attorney, Baker testified unequivocally that Local 22 had instructed its members not to use the products of Thorpe and Techalloy "in all circumstances" because neither of the suppliers was "in agreement" with the Union (Jt. App. 79). When the Union's attorney "suggested" that Baker "misunderstood" his question, the Trial Examiner interrupted and asked:

> "You mean you have no contract with them?"

to which Baker responded:

> "No contract, no."

Although witness Baker subsequently testified that the Union members were instructed not to use the products of Thorpe and Techalloy because such would violate Articles VI and XIII of the Contract (Jt. App. 78-80), no explanation, qualification or denial of the above quoted statement was ever given by Mr. Baker.

2. The Testimony of Business Agent Shrode (Local 22):

In answer to questions by the Board's attorney on cross-examination, Local 22 Business Agent Shrode admitted that he knew that Techalloy did not have a contract with the Union, was not a member of the Petitioner Association, and that its employees precut the metal bands (Jt. App. 106). Shrode admitted that he had instructed the jobsite employees not to apply the Techalloy bands because they had not been precut by Johns-Manville employees (Jt. App. 107).

Other evidence showed that an asbestos worker, a member of Local 22, was told by Business Agent Shrode that union decals could not be put on the Techalloy bands because they had been cut by someone other than an asbestos worker or Local 22 (Jt. App. 60). This was related to the Johns-Manville contract manager by the asbestos worker.

The Johns-Manville contract manager testified that precut aluminum bands were applied on the NASA job without objection by the Union, although the Business Agent denied knowledge of that (Jt. App. 63, 67-68).

3. The Testimony of Business Agent Eaton (Local 113):

The significant testimony of Business Agent Eaton of Local 113 shows that the strike was halted when he was

given proof orally and by letter that the mitered fittings were made in the Armstrong shop in Houston and that he was only following instructions in calling the strike (Res. Ex. 1; Jt. App. 110-111, 116-117).

D. THE USE OF DECALS

The evidence relating to the use of decals to identify "union made" goods points exclusively to their use in this case for the unlawful purpose of boycotting nonunion products. The decal is a gummed label which the Union requires the employee in charge of the shop to affix to each product as it is fabricated (Jt. App. 88-89). The decals are attached to indicate that the materials have been made by the employee of a contractor working under the Union agreement (Jt. App. 95). Decals are issued only to an employer who is in a contractual relationship with the Union (Jt. App. 98). Such employers are entitled to obtain decals even though they employ nonunion employees (Jt. App. 102). A nonmember employee working for a contractor who is under contract with the Union would be issued decals (Jt. App. 102).

E. THE INTERNATIONAL UNION'S INSTRUCTIONS FOR THE USE OF DECALS

Speaking for the General Executive Board of the International Union, Vice President Baker issued a memorandum to the local unions on May 27, 1963, which explains the purpose and use of the decals as fixed by the International. The memorandum states that the General Executive Board had "approved" the use of decals in order to identify the *asbestos worker* who performed the work on the material to which it is attached. Such decals were required to be placed on fabricated fittings even though they were made by a different union membership located away from the

"fabrication shop site." A member who fabricated material and failed to affix the decal "signifying union made" was made equally responsible with the member who applied material without decals (G.C. Ex. 2; Jt. App. 96, 114-115).

F. THE EVIDENCE RELIED UPON BY THE BOARD AND COURT BELOW

The evidence relied upon by the Board and the court below to find that the conduct of the Union "constituted protected primary activity and was not for *an object* proscribed by the . . . Act" was that the work of cutting metal bands and mitering fittings was reserved for the employees of Johns-Manville and Armstrong and could not be subcontracted.

The Board decision states that purchases of the materials deprived the Johns-Manville and Armstrong employees of work to which they were entitled under the contract, and that the Union's refusal to handle the Thorpe and Techalloy products was in protest of such deprivation. This, reasoned the Board, was a primary activity protected by the Act. The Board made no mention of the other testimony or conduct related heretofore, which evidences a second and equally sought-after "object" of the strike.

The court below held that "the Board was not required as a matter of law to accept Baker's statement as gospel" in view of the later testimony that the Union's objective was work preservation, because neither local union had ever protested the use or application of any other product purchased by Johns-Manville or Armstrong, because the decals were used to police the ban on subcontracting, and because the Union did not refuse to apply other products of Techalloy and Thorpe purchased by Johns-Manville and Armstrong not bearing union labels. The finding of the Trial Examiner was that the mitering and cutting, even

when performed by Johns-Manville and Armstrong, were performed at their shops and not at the jobsite (R. 185).

1. The Decision of the Trial Examiner:

The Trial Examiner found the activity of the Union was not a boycott of nonunion goods and that Articles VI and XIII of the contract are lawful. Then, stating the case in a posture most favorable to the Union, he found the Union's refusal to handle the Thorpe and Techalloy products to be unlawful on the ground that the exemption of Section 8(e) of the Act applies only to work to be done at the jobsite; it does not apply to goods manufactured off the jobsite but later shipped there for installation. Moreover, the Examiner found that even if the application of the Thorpe and Techalloy products had been jobsite construction work within Section 8(e), the Union's refusal to handle these products would have been unlawful under *Local 1976, United Brotherhood of Carpenters & Joiners of America* v. *NLRB,* (Sand Door) 357 U.S. 93 (1958). The Examiner exonerated the International (R. 186-187), but found both Local 113 and Local 22 to be guilty of unfair labor practices within Section 8(b)(4)(i) and (ii)(B) of the Act.

2. The Decision of the Board:

The Board found that the purchase of the Thorpe and Techalloy materials had deprived the Johns-Manville and Armstrong employees of work customarily performed by them and that the object of the Union's conduct was to protect or preserve this work. Accordingly, the Board reversed the Trial Examiner and held the Union's activity to be primary and protected (R. 201-202). The Board did not discuss the testimony of Baker or any other testimony pointing to the other object of the Union's activity, or Section 8(e) of the Act.

3. The Decision of the Court Below:

The court below affirmed the Board in part, holding that Section 8(e) applies only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with which the Union has a dispute. Primary subcontracting claims, on the other hand, were said to fall outside the ambit of Section 8(e). It also held that an agreement banning the subcontracting of preparation work, as here, not being a "hot cargo" agreement or on its face an attempt at secondary boycott *in futuro*, is not prohibited by Section 8(e) (R. 241).

The court below reversed the Board as to its finding of the conduct of Local 113 (Armstrong job), saying that the thrust of the Act, and particularly Section 8(b)(4), is to require each union to restrict its economic coercion to its own labor disputes and not use that weapon in aid of another union as Local 113 had in aid of Local 22 (R. 242-243).

SUMMARY OF THE ARGUMENT

I. The standard for review of the findings of the Board as stated by *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), which both the Board and the lower court failed to apply properly, necessitates a finding that one "object" of the strikes called by Local Unions No. 22 and No. 113 was to boycott the materials of off-jobsite suppliers. This finding, in turn, would be sufficient under *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951), to render the strike an unfair labor practice, even, *assuming arguendo* that Section 8(e) would not render unlawful a strike called for another object, i.e., work preservation.

II. The plain language of Section 8(e) of the Act and its legislative history show that such provision was intended

to render unlawful any agreement preventing subcontracting of work to be done off the jobsite in the construction industry. Although the contract upon which the instant case is based is not unlawful on its face, a strike seeking to enforce the contract so as to bring about a cessation of business with another employer is unlawful despite the fact that preservation of work for the union is also an object of the strike. The law as established in *Sand Door (Local 1976, United Bhd. of Carpenters & Joiners of America* v. *NLRB)*, 357 U.S. 93 (1958), was unchanged by the 1959 amendments to the Act so that a strike to enforce a contract which causes an employer to cease doing business with another employer, whether on or off the jobsite, is unlawful.

ARGUMENT

I.

In Reviewing the Finding of the Board That the Only Object of the Refusal to Handle Thorpe and Techalloy Products Was Work Preservation, the Court Below Failed to Give Proper Consideration to the Record as a Whole, as Required by § 10(f) of the Act and Decisions of this Court.

In *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), this Court delineated the test to be applied in determining whether a finding of the Board is supported by substantial evidence and held that such determination shall not be made merely by a consideration of evidence which would justify the finding but shall be made upon consideration of all of the evidence. The rule established by this Court does not permit evidence of a separate fact not in conflict with other facts in testimony by the same witness, which would unmistakably prove a violation of the Act, to be ignored or distinguished. Nevertheless, this is precisely what the Board and the court below did.

Brooks Baker, the Secretary of Local 22 and Vice President of the International Union, testifying in answer to questions from Union counsel, admitted unequivocally that the local had instructed its members not to use the products of Thorpe and Techalloy under all circumstances because "we are not in agreement with Thorpe or Techalloy." Counsel for the Union attempted to suggest that Baker had not understood the question, but the Trial Examiner interposed the question: "You mean you have no contract with them?" To which Baker replied: "No contract, no." (Jt. App. 78-79)

Although Baker subsequently testified that the members would not handle the materials of the two nonunion suppliers because to do so would constitute a breach of contract these two statements from a single witness, the obviously knowledgeable International Vice President who answered the question not in ordinary lay language but in the very language of the Act, did not present to the Board "a choice between two fairly conflicting views," from which the Board could properly conclude that the only object of the refusal was work preservation under the provisions of the contract.

The Board refused to recognize the significance of this testimony. The court below attempted to distinguish it in view of later testimony not contradictory of the earlier statement, and held that the Board, as a matter of law, was not required to accept Baker's testimony with all of its legal implications (R. 237). The strained efforts of the court below to circumvent the effect of this admission against interest by the principal Union spokesman demonstrates the erroneous approach of the Court of Appeals to its review of the record before the Board. The Court attempts to create a conflict between this admission and other evidence to rule that the Board did not have to accept this

statement "as gospel." However, it is inescapable that there is no conflict between evidence which shows that there were two motives or objects for the conduct of the Union.

Of course, Petitioner here makes no claim of bias by the Board or the court below in the handling of this evidence. However, that such an admission against interest may not be ignored is evident from the holding of this Court in *NLRB* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 660 (1949), in which a claim that discrediting evidence gave proof of bias was asserted. This Court approved the following quotation from an opinion from the United States Court of Appeals for the Fifth Circuit, in which Judge Hutcheson had stated:

> "Unless the credited evidence . . . carries its own death wound, that is, is incredible and therefore, cannot in law be credited, and the discredited evidence, . . . carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, we cannot determine that to credit the one and discredit the other is an evidence of bias."

Petitioner submits that an admission against interest by a high union official "carries its own irrefutable truth" and may not be disregarded. The court below recognized that the testimony of Baker referred to ". . . does indicate that Baker at least may have believed that 'an object' of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy." If the testimony of the Local Union Secretary and International Vice President as to his beliefs of the objects of the refusal are not to be binding upon both the Local and International Unions, an employer will find it impossible to obtain relief from admittedly illegal conduct.

Baker's admission of the Union's improper motivation is substantiated by the publication "General Information — Subject: Decal Labels," which explains that decals were to

be used to reveal whether materials or products were union-made. (Jt. App. 114-115) This publication demonstrates the approval of International Union Executive Board of the purpose and use of decals to show whether or not materials furnished to union members for application are union-made, and thus, this evidence is binding against the International Union as well as the local. *United States* v. *White,* 322 U.S. 694, 702 (1944).

In *Local 761, Int'l Union of Elec. Radio & Machine Workers.* v. *NLRB,* 366 U.S. 667 (1961), this Court discussed the difference in legitimate primary activity and secondary activity in connection with reserve gate picketing which had a more than incidental adverse effect on a neutral employer. The Court recognized the problem of ascertaining the object of the picketing and said:

> "However difficult the drawing of lines more nice than obvious, the statute compels the task. Accordingly, the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause. Although '[n]o rigid rule which would make . . . [a] few factors conclusive is contained in or deducible from the statute,' *Sales Drivers* v. *Labor Board,* 229 F. 2d 514, 517 '[i]n the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent." 366 U.S. at 674.

The present case appears to be one of those rare instances where there is an admission by the union of an illegal intent. The standard of *Universal Camera* has been misapprehended and grossly misapplied, because the court below did no more than select one of two stated objects of the strike upon which to base its affirmance of the Board. This fact determination, if indeed there is a fact question, is not supported by substantial evidence on the record considered as a whole,

and a reversal is required. *NLRB* v. *Montgomery Ward & Co.*, 192 F. 2d 160 (2nd Cir. 1951); *NLRB* v. *American Car & Foundry Co.*, 161 F. 2d 501 (7th Cir. 1947).

The fact that a lawful "object" of the union conduct exists along with another illegal "object" does not render the strike lawful. *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951).

II.

The Provisions of Section 8(b)(4)(i) and (ii)(B) and 8(e) of the Act Proscribe the Application of Articles VI and XIII of the Contract to Materials of Secondary Employers Manufactured or Fabricated Off the Site of the Construction.

A. The Board and the Court Below Have Interpreted Section 8(b)(4)(i) and (ii)(B) To Permit An Unlawful Boycott of the Materials of Secondary Employers If One of the Objects Is To Preserve the Work Which a Trade Claims as Its Own.

If the "work preservation" doctrine is entitled to judicial sanction merely by a union avowing that *one* of its strike objectives was the preservation of work, the fundamental concept of proscription of secondary boycotts as contained in the 1959 amendment of the Act will be nullified. The intent of the Congress that such should not be the effect of the 1959 amendment in attaching to Section 8(b)(4)(B) the proviso:

> "That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

and adding Section 8(e):

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any con-

> tract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .*"

is clearly discernable from the reports of the history of this legislation, which will be discussed below. The plain language of the Act as amended, however, demonstrates that the Court of Appeals erred by holding that even absent the proviso of Section 8(e), the strike was protected because the "contracting out of work" is a statutory subject of collective bargaining under Section 8(d), citing *Fibreboard Paper Prod. Corp.* v. *NLRB*, 379 U.S. 203 (1964). *Fibreboard*, however, involved a refusal to bargain under Section 8(a)(5), not a strike to enforce a contract provision in such a fashion as to create an unlawful secondary boycott. Such a strike was not lawful before the 1959 amendments and is still unlawful. The proviso added to Section 8(b)(4)(B) protects only lawful primary action.

In construing Section 8(b)(4)(A)* in *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951), this Court held that if *an object of the strike is unlawful, the strike is unlawful*, stating:

---

* This section has become Section 8(b)(4)(B) by the 1959 amendments to the Act.

> "It is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section.[18]"

Noting the prohibitions of the Norris-LaGuardia Act upon the halting of strikes, including secondary boycotts, by the federal courts, the Court quoted Senator Taft's explanation of this section:

> "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provisions dealing with secondary boycotts as to make them an unfair labor practice. 93 Cong. Rec. 4198." 341 U.S. at 686.

and held that Section 8(b)(4) ". . . restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else."

If, as admitted by the Union Vice President, an object of the strike here was to boycott the goods of nonunion suppliers Thorpe and Techalloy, whether or not for simultaneous work preservation objectives, the strike was unlawful. Without that admission, however, the provisions of Section (8)(e) would outlaw the strike.

---

[18] "Senator Taft, Sponsor of the bill, stated in his supplementary analysis of it as passed: 'Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words "for the purpose of" and inserting the clause "where an object thereof is."' 93 Cong. Rec. 6859." 341 U.S. at 689.

B. The Holding of the Court of Appeals That the Contract Must Constitute a Boycott On Its Face Squares with Neither Logic Nor the Language of Section 8(e).

Section (8)(e) proscribes all agreements between employers and unions which provide that the employer will not do business with others, except in the garment industry and in the construction industry where jobsite subcontracting is the subject of such agreement.

The contract here in dispute does not on its face violate this provision. It is the contention of Petitioner, however, that if Local 22 and Petitioner could not enter into a contract which would prevent Johns-Manville from doing business with an off the jobsite contractor, it is unlawful for the Union to enforce its contract by a strike which has that result. That is, the contract becomes unlawful under Section 8(e) when applied to subcontracting of work to be performed off the jobsite. That Congress intended to outlaw any agreement which would affect off jobsite contractors or suppliers is apparent not only from the language of Section 8(e) but from the legislative history of that section as well.

Perhaps the best indication of the intent of Congress in enacting Section 8(e) is the remarks of one of its staunchest opponents. Senator Wayne Morse, in speaking against the provisions of the bill that came from the Conference Committee, said:

> "The bill makes it illegal for a union and an employer to enter into any contract or agreement, express or implied, whereby such employer ceases or agrees to cease to do business with another employer or person. This is the co-called hot cargo agreement . . . . . .
>
> • • • •
>
> "First. *It would prevent a union from protecting the bargaining unit it represents by obtaining an agreement*

> *not to subcontract work normally performed by employees in the unit* . . . . . ." (105 Cong. Rec. 16399).

The eminence of Senator Morse' statement is borne out by the Board decision in *United Mine Workers of America*, 144 NLRB 228 (1963), where the Board held that a clause claimed by the Union to be protection against the evils of subcontracting, was prohibited by Section 8(e). The Board's discussion of the construction industry jobsite exemption to Section 8(e) makes it clear that the Congressional purpose in the 1959 amendments was to eliminate boycotting even though it was "protective of unit work." 144 NLRB at 237-238. The construction industry exception in Section 8(e) is explicitly limited to "work to be done at the site of the construction." Language so clear and expressive of congessional purpose should not be disregarded lightly.

That it was the congressional purpose to outlaw such traditional and typical activity as seeking to guarantee preservation of work traditionally done by a bargaining unit if a boycott of an off jobsite contractor was involved, it is only necessary to refer to the remarks of then Senator John F. Kennedy concerning the report of the Conference Committee on S. 1555 (S. Doc. No. 51), 105 Cong. Rec. 16354, where he called particular attention to the construction industry exemption, saying that the proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or to suppliers such as Thorpe and Techalloy here, who do not work at the jobsite.

The full text of his statement appears hereafter.

> "The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.

"This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The Denver Building Trades (341 U.S. 675) and the Moore Drydock (92 N.L.R.B. 547) cases would remain in force.

"Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), *strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the Sand Door case (357 U.S. 93) is applicable.*

"It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.

"It should be particularly noted that *the proviso relates only to* the 'contracting or subcontracting of *work to be done at the site of the construction.' The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.*" (Emphasis added). 105 Cong. Rec. 16415.

Senator John F. Kennedy, speaking further on the Committee Report, clearly dispelled the misconception that only "hot cargo" agreements such as those spotlighted in Teamster contracts with motor carriers subject to Part II of the Interstate Commerce Act, which Senate Bill 1555 (Kennedy-Ervin) sought to ban were made unlawful by Section 8(e):

"Fourth. Hot cargo. The Landrum-Griffin bill extended the 'hot cargo' provisions of the Senate bill, which we applied only to Teamsters, to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. Both changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries."

See Summary Analysis of Conference Agreement as to Title VII, Taft-Hartley Amendments, Cong. Rec., 86th Cong., 1st Sess. (September 9, 1959), p. 17181.

On the day that the President signed the bill making Section 8(e) law, a controversy arose as to the applicability of "preparation clauses" such as found in Articles VI and XIII of the contract here, under Section 8(e). This revolved around the question whether the exemption covered work that "could be performed" at the jobsite or work that was "actually done" on the jobsite as well. Senator McNamara, an opponent of the bill, contended that in some trades, such as the plumbing trade, much prefabrication work such as bending pipe was performed "off the jobsite" and that he believed the Section 8(e) proviso was intended to cover all work that *could be done* at the construction site. 105 Cong. Rec. 19785.

Representative Carroll D. Kearns, one of the proponents of the curative legislation submitted and a proponent of the bill, became alarmed at Senator McNamara's strained construction. He stated that it was contrary to the bill's clear and literal meaning and would "open up a Pandora's box of evils in the construction industry which Congress

meant to eliminate." In that regard he pointed out the fallacy of Senator McNamara's argument, where he said:

> "The Senate bill merely outlawed hot cargo agreements with common carriers. The House amendment interdicted agreements not to do business with another entered into by any employer. At the time of the consideration of this amendment there had been some discussion of a proposal to permit unions to picket a construction site if they had disputes with any contractor on the job. It was partly in this frame of reference that the proviso to section 8(e) was written which provides —
>
> > 'That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction.'
>
> "As in the common-situs picketing problem, it was the location of the work that we had in mind and, as a reasonable compromise, we provided that the agreement must relate to work actually done at the site. Work done or products manufactured, processed, fabricated, and so forth by another employer away from the construction site could not be subject to a hot cargo agreement. *It was not intended to restrict an employer's freedom to do business or purchase from any other person and to decide in what form the product or materials shall arrive on the job.* Furthermore, to interpret the proviso to cover any work or product which could be done at the site would permit restrictions on the installation of many other products besides prefabricated pipe which arrive on the job in prefabricated form. This certainly was not in my mind.
>
> "The conference report supports my view. It states, at page 39, that the proviso in question relates only and exclusively to the contracting or subcontracting of work to be done at the site of construction and that it does not exempt from section 8(e) agreements relat-

ing to supplies or other products or materials shipped to the site of construction. The legislative history in the Senate is also in accord with my view. On September 3, 1959, Senator Kennedy, in reporting the conference agreement to the Senate, said at page 16415 of the Record:

> 'It should be particularly noted that the proviso relates only to the 'contracting or subcontracting of work to be done at the site of the construction.' The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.'

"Senator Morse also said, on the same day at page 16399 of the Record, in referring to the hot cargo amendment:

> 'First. It would prevent a union from protecting the bargaining unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit.'

"The Senate Committee on Labor and Public Welfare printed a section by section analysis of the act, published September 10, 1959, and stated with respect to the section in question that the prohibition against hot cargo agreements does not apply to the construction industry relating to work to be done at the construction site.

"It seems clear to me, therefore, that an employer, even in the construction industry, retains the freedom to choose how the products or materials he utilizes shall arrive on the job — prefabricated or not — and that such freedom cannot be restricted by agreements with labor organizations." (Emphasis added). 105 Cong. Rec. 20005.

Thus, the Legislative History clearly indicates that agreements prohibiting the subcontracting of jobsite construction work to a non-union contractor would not be

unlawful, however, Section 8(e) would render unlawful all agreements prohibiting the subcontracting of *off* jobsite construction work. Therefore the Section 8(e) proviso would not insulate a union, which struck to enforce such an agreement, from an unfair labor practice charge under Section 8(b)(4)(i) or (ii)(B).

It was clearly the intention of Congress to retain existing law as to the enforcement of contracts covered by section 8(e) including those exempted by the proviso. The rule established by this Court in *Sand Door (Local 1976, United Bhd. of Carpenters and Joiners of America* v. *NLRB)*, 357 U.S. 93 (1958), that a union may not lawfully strike to enforce a contract which prevents an employer from doing business with another employer was intended to be unchanged, even if the contract is lawful under the proviso. Thus the trial Examiner was correct when he held:

> "Nor would Respondents have been helped if the work had been jobsite construction work for a refusal to handle gods (sic.) for the purpose of enforcing such an agreement is unlawful under *Sand Door*. *Sand Door* was specifically stated in the legislative history to be controlling in construing the exemption proviso of Section 8(e). (Leg. Hist., Vol. 1, p. 943, *supra;* Leg. Hist., Vol. II, p. 1433, *supra;* Leg. Hist., Vol. II, p. 1829)."

> "Respondents, then, were under a misapprehension if they believed the refusals were justifiable under their construction of their rights to protect their contract. The evidence here is clear that the mitering and cutting, even when performed by Armstrong and Johns-Manville employees, were performed at their shops and not at the jobsite." (R. 185-186).

NLRB v. *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 294*, 342 F. 2d 18 (2nd Cir. 1965), clearly points up the error committed by

the Board and Court of Appeals. In the *International* case, Local 294 had a contract containing a "subcontracting" and "site work" clause, the latter being defined as "all work done on the site proper and all hauling from an area outside the project area to the project, which outside area is operated and maintained by the prime contractor for use in conjunction with the project." This language is not on its face a "hot cargo" clause. A subcontractor, who had the excavation and concrete work under the prime contractor, ordered ready-mix concrete from a supplier of building materials "off the jobsite." The ready-mix drivers were members of the Carpenters Union, and the Teamsters refused to permit the wet cement to be driven onto the plant site unless the Teamsters members drove the trucks. The Board held that the preparation of mixing cement for delivery to the jobsite was part of the delivery process and thus not work to be done on the site of the work.

The Teamsters contended that the contract did not contravene Section 8(e), and therefore Section 8(b)(4)(ii)(A) was not violated. The Second Circuit Court of Appeals sustained the Board and held:

> "'Hot cargo' agreements in any form are prohibited by section 8(e). *Truck Drivers Union Local No. 413, Intern. Broth. of Teamsters* v. *NLRB*, 118 U.S. App. D.C. 149, 334 F. 2d 539, cert. denied, 379 U.S. 916 . . . ." 342 F. 2d at 21.

Thus where a contractual provision, neutral on its face, becomes *as applied* a "hot cargo" clause, it is forbidden by Section 8(e). It follows that cement to be poured on the jobsite but hauled from off jobsite is not dissimilar to precut bands or mitered fittings which are cut off jobsite for application on the jobsite.

In the *Local 413** case, the Court of Appeals for the District of Columbia discusses the Board's position on subcontracting clauses, holding that it is not the fact of subcontracting, but a clause which limits the persons with whom subcontracts can be made which is unlawful**. In this regard, the Board said:

> "Like the typical hot cargo clause itself, a subcontractor clause is secondary where it limits, not the fact of subcontracting — either prohibiting it outright or conditioning it upon, e.g., current full employment in the unit — but the persons with whom the signatory employer may subcontract . . ." 334 F. 2d at 548

The court disagreed with the Board and pointed out the difference in the two types of clauses, which may control the situation here, where it said:

> "This Board position groups together, as secondary, contract clauses which impose boycotts on subcontractors not signatory to union agreements, and those which merely require subcontractors to meet the equivalent of union standards in order to protect the work standards of the employees of the contracting employer. But the distinction between these two types of clauses is vital. Union-signatory subcontracting clauses are secondary, and therefore within the scope of § 8(e), while union-standards subcontracting clauses are primary as to the contracting employer (Citing authorities)." ibid.

The subcontracting clause here would not be unlawful *per se* under that rule because it does not state with whom

---

* *Truck Drivers Union Local No. 413, Int. Bhd. of Teamsters etc. v. NLRB*, 334 F. 2d 539 (D.C. Cir.), *cert. denied, 379 U.S. 916* (1964).

** The clause involved was as follows:

> "The Employer agrees to refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed."

subcontracting is forbidden, but it is not necessary that the limitation on subcontracting be spelled out in such clauses in order to constitute a violation under the statute where, as the testimony of Union Vice President Baker shows here, the prime contractor is limited to subcontracting "under all circumstances" with persons in agreement with the Union. That fact in itself would violate the Act under the Board's own decision. Where the Union refuses to handle the materials of two nonunion off-jobsite suppliers, such strike is unlawful under the decision of this Court in *Sand Door*.

The matter of prefabrication and subcontracting is also before this Court in *National Woodwork Mfrs. Ass'n* v. *NLRB*, 354 F. 2d 594 (7th Cir. 1965) (Nos. 110-111, October, 1966 Term), where factory machined doors were boycotted at the Frouge Corporation's job at the Naval Capehart Housing Project in Philadelphia. Rule 17 there involved differs from the subcontracting provision of Article VI of the Agreement before the Court in the instant case. It has, nevertheless, achieved the same ultimate result and has brought about a labor dispute, only one of the many predicted by Senator Taft. See *NLRB* v. *Washington-Oregon Shingle Weavers Dist. Council*, 211 F. 2d 149 (9th Cir. 1954). In the Frouge boycott the Court of Appeals for the Seventh Circuit adopted the "work preservation" rationale. In addition, it adopted the artificial "control" theory, not involved in the instant dispute, upon which it found Frouge to be the object of a "primary strike or primary picketing", and therefore held the union exempted by the proviso of Section 8(b)(4)(B).

The instant case differs from *Frouge* in that the testimony of the Union clearly shows that "an object" of the strike here was an intentional product boycott of Thorpe and Techalloy, who performed no work at the jobsite, because they were not union contractors. But, the cases

differ only in that respect, and even though the record in the instant case contains plain statements by the Union and Local 22 of their unlawful purpose, which would call for a reversal of the Board and the court below, the issue is broader than that. Both cases should be reversed upon the fundamental concept that they evince proscribed secondary boycotts which render the entire strike illegal even though the conduct of the unions is claimed also to be motivated by a hope of preserving work for a trade.

CONCLUSION

The decision of the Court of Appeals should be reversed and the conduct of Local 22 found to be an unfair labor practice under a proper interpretation of Section 8(e). In the alternative, this case should be remanded to the Court of Appeals for a correct review of the record as a whole on the question of the propriety of the Board finding that the only object of the strike was work preservation.

Respectfully submitted,

W. D. Deakins, Jr.
2100 First City National
Bank Building
Houston, Texas 77002

Counsel for Petitioner,
Houston Insulation
Contractors Association

Of Counsel:

Ross N. Sterling
Vinson, Elkins, Weems & Searls
First City National Bank Building
Houston, Texas 77002

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Sec. 158, are as follows:

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from han-

dling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alternation, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

Sec. 10 (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the

aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Petitioner were served upon Counsel for Respondent and the Solicitor General of the United States by placing the same in the United States Mails, Air Mail, postage prepaid, addressed to such Counsel at their addresses of record this ..... day of December, 1966.

.....

W. D. DEAKINS, JR.
Attorney for Petitioner